Supreme Court, U.S.
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No. 10-725

In The
SUPREME COURT OF THE UNITED STATES

WILLIAM L. HARDY, M.D.,
Petitioner,

v.

STATE OF TENNESSEE, DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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Respondent contends that compelling reasons do not exist for this Court to grant review. Respondent's argument fails. This case involves whether State actors in administrative proceedings seeking to restrict a medical license may make and break agreements without recourse. Absent guidance from this Court, lower courts will continue to misconstrue the Fourteenth Amendment's Due Process Clause in the administrative context to provide only the barest procedural protections of notice and hearing. Whether and what recourse exists for this type of constitutional violation was properly raised and passed upon below.

I. Both Notice and The Opportunity To Be Heard Must Be *Meaningful* If They Are To Be Consistent with Due Process.

The character and scope of the Fourteenth Amendment's Due Process Clause in the administrative context was raised and passed on below. *See* Sup. Ct. R. 14(g)(i). More particularly, in the Petition and at all stages of this case, the issue has been whether State actors may make and break agreements when attempting to revoke a person's liberty and property interest in a medical license. Just providing a holder of a medical license with notice of the attempted deprivation and an opportunity for a hearing on the merits does not resolve the procedural implications of State misconduct in between the notice and any hearing.

The Respondent artificially divides the Petition's core issue into discrete units then asserts that the Petitioner "received abundant procedural due process" and that substantive due process was not raised below. (Brief Opp. 11). This division mischaracterizes the Petition's substance.

First, with respect to procedural due process, the Respondent is correct that the lower court concluded that Petitioner received procedural due process protections, but the Brief in Opposition fails to acknowledge that the lower court perfunctorily concluded so without conducting the analysis required by this Court. *See* (Pet. 10-11) (quoting *Matthews v. Eldridge*, 424 U.S. 319

(1976)). A mechanical recitation of "notice and an opportunity to be heard" as the sole talisman of the Due Process Clause, without establishing the sufficiency of providing bare notice and hearing when there has been State misconduct *in between* the notice and hearing stages, conflicts with relevant decisions of this Court.

Trying to avoid procedural due process altogether, the Respondent also asserts that the Tennessee Court of Appeals' decision was "not [based] upon federal or constitutional jurisprudence." (Brief Opp. 8). In the alternative, Respondent writes that the Tennessee Court of Appeals' decision implicates no important question of federal law because its discussion of due process was *obiter dictum*. (Brief Opp. 9-10). The issue raised in the Petition was arguably determined in *dictum* by the Tennessee Court of Appeals, but it was decided based on an interpretation of the federal constitution. *See* (App. 42) (citing Constitution for proposition that liberty or property interest cannot be taken without due process). Moreover, the Administrative Law Judge, in finding the existence of two prior agreements and a breach on the part of the State, clearly determined the issue as one of due process. (Pet. 4-5); (App. 3-7). The Davidson County Chancery Court also addressed the due process issue. (Pet. 5-6); (App. 20-24). Whether one of the lower courts perhaps decided an issue in *dictum* while the others addressed it in substance, the issue was still "pressed and passed upon below." *Cf. United States*

v. Williams, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.' That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon . . . .") (internal citations omitted). A review of the entirety of the record shows that petitioner consistently challenged the proceedings as violating due process. *See e.g.*, (Record 500-02) (briefing issue of due process as part of motion to dismiss before the Tennessee Board of Medical Examiners).

Second, and related to the previous point, with respect to substantive due process, even if Respondent is correct that the precise issue was not previously raised, *but see* Appellant's Brief to Tenn. Ct. App. at p. 22, it is fairly contained within the due process issues previously raised and properly before this Court. *See Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 893 (2010) ("All concede that this claim is properly before us. And "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'"). As set forth in the Petition, Petitioner's due process claims have been asserted and properly preserved for review by this Court. *See* (Pet. 5-7) (summarizing portions of the opinions below in which due process was discussed).

II. The Record is Sufficient for This Court To Rule on the Merits of Petitioner's Claim and To Provide Guidance On Remand About the Protections Afforded to Interests Protected by the Due Process Clause.

The factual record established below is sufficient for this Court to determine the constitutional issue posed in the Petition or the appropriate remedy and analysis upon remand. The Respondent opposes this Court's review by claiming that the issues raised in the Petition are not properly before this Court because whether the State and its agents breached two enforceable agreements was "hotly disputed between the parties . . . ." (Brief Opp. 8). The Respondent may continue to dispute that issue, but the Administrative Law Judge who heard arguments and reviewed "the pleadings, testimony of the witnesses and [made] a full and complete review of the record" (Brief Opp. 2) determined that "the 'uncontroverted proof' showed that the parties reached a settlement agreement resulting in an 'Agreed Order' in May 2006, and had reached another settlement agreement . . . [that] could not be 'reconstituted.'" (Brief Opp. 2-3). The State does not dwell on the aspect of the Administrative Law Judge's finding that the first agreement could not be reconstituted because "[t]he State lost or otherwise misplaced the notes of [the] Deputy General Counsel [] memorializing the terms of the first agreement." (App. 5).

Even assuming *arguendo* that "material issues of disputed fact" exist about the agreements between the parties (Brief Opp. 5) and whether the claim against Petitioner's license had been settled by agreement (Brief Opp. 6), the record is sufficient for the Court to determine whether consent by a State agent to resolve a claim repeatedly asserted and withdrawn against a licensee based on changes in personnel is consistent with the Due Process Clause. *See* (Brief Opp. 9) ("consent withdrawn").

Even if the Court declines to reach the factual issue of the existence of agreement and breach, it can still establish the proper analytical framework under the Due Process Clause and remand the case for further factual determinations and resolution under that standard consistent with *Santobello v. New York*, 404 U.S. 257 (1971). The issue under a *Santobello*-type analysis is what law should be applied in determining whether there has been an agreement and whether there has been a breach. In *Santobello*, this Court determined that safeguards are required by the Constitution for a plea of guilty to be fairly entered. *Id.* at 262. The Court then remanded the case for the lower court to apply the announced standard. *Id.* at 262-63 ("[W]e conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration. The ultimate relief to which petitioner is entitled we leave to the discretion of

the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.").

The Petition asks this Court to similarly determine whether due process principles beyond mechanical notice and hearing apply in administrative actions that affect liberty and property interests protected by the federal constitution, and respectfully submits that the record established below is sufficient for this determination.

III. The Citation Designation of a State Court's Opinion Is Irrelevant If the Opinion Erroneously Decides an Important Federal Question.

The infringement of a constitutional right by State agents is not removed from this Court's purview because an opinion has been marked "Not for Publication" pursuant to a state court rule. *Contra* (Brief Opp. 10). First, the exceptions to Tennessee Supreme Court Rule 4 preventing citation to an opinion so designated swallow the rule. *See* Tenn. Sup. Ct. R. 4(E)(2) (providing that an opinion designated "Not for Publication" should

not be cited "except when the opinion is the basis for a claim of res judicata, collateral estoppel, law of the case, or to establish a split of authority, or when the opinion is relevant to a criminal, post-conviction or habeas corpus action involving the same defendant"). More importantly, whether an opinion can be cited and the amount of persuasion assigned to it by a state court rule is not a relevant consideration under this Court's considerations governing review on certiorari. *See* Sup. Ct. R. 10 (describing listed reasons as "neither controlling nor fully measuring the Court's discretion"). The proper issue is whether, as set forth in the Petition, the lower court's opinion is inconsistent with this Court's precedent.

The Petition outlines why it is inconsistent with the Fourteenth Amendment's Due Process Clause for State actors to make and break agreements during administrative proceedings seeking to restrict a medical license, and asks this Court either to provide guidance about the proper recourse for such violations or to establish a standard by which lower courts can analyze the alleged deprivation of this liberty and property interest consistent with Due Process safeguards.

CONCLUSION

For the above reasons and those articled in his Petition, Dr. Hardy respectfully prays that this Honorable Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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